IN THE HIGH COURT OF HIMACHAL PRADESH AT SHIMLA

CWP No. 387 of 2006 with CWP No.388 of 2006.

Judgment reserved on 30th October, 2007

Date of Decision: 5th December, 2007.

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1. **CWP No. 387 of 2006.**

Chure Ram Thakur .. Petitioner.

Versus

Hon'ble High Court of Himachal Pradesh and others .. Respondents.

2. **CWP No. 388 of 2006.**

Sukh Ram .. Petitioner.

Versus

Hon'ble High Court of Himachal Pradesh and others .. Respondents.

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The Hon'ble Mr. Justice Rajiv Sharma, Judge.

Whether approved for reporting?[1] Yes.

For the petitioners: Mr. Bimal Gupta, Advocate.

For the respondents: Mr. Atul Jhingan, Advocate.

Rajiv Sharma, J.

These two writ petitions are similar in nature and they involve identical question of law and facts, therefore, they are being decided together by this common judgment.

CWP No. 387 of 2006.

The brief facts necessary for the adjudication of this petition are that the petitioner has joined as Peon in the establishment of Senior Sub Judge-cum-Chief Judicial Magistrate, Lahaul and Spiti at Kullu in Mandi,

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[1] Whether the reporters of Local Papers may be allowed to see the judgment? Yes

Kullu and Lahaul Spiti Division, Mandi. He was selected as Clerk in the Mandi, Kullu and Lahaul Spiti Division, Mandi and joined in that capacity on 15th June, 1982. He was promoted as Senior Clerk with effect from 15th June, 1987 vide order dated 4th December, 1990. He was further promoted to the post of Junior Assistant with effect from 15th June, 1992 vide order dated 4th March, 1993. He applied to respondent No.2 for being considered for the post of Record Keeper equivalent to Senior Assistant. Respondent No.2 vide office order dated 20th February, 1996 on the basis of test and interview offered appointment to the petitioner as Record Keeper on regular basis.

Respondents No.3 to 7 were promoted as Senior Assistants on ad-hoc basis by respondent No.2 vide office order dated 22nd August, 1995. Respondents No.4 to 7 were regularized by respondent No.2 vide office order dated 30th April, 1997 with effect from their initial joining as Superintendent/Assistant. The petitioner made a representation to respondent No.2 for not regularizing respondent No.3 as Senior Assistant retrospectively. One Shri Sukh Ram and Neer Singh Sharma also made similar representations. Respondent No.2 rejected the representations preferred by the petitioner and S/Shri Sukh Ram and Neer Singh Sharma by a common order dated 21st November, 2003. Respondent No.3 was regularized by respondent No.2 vide office order dated 27th November, 2003. Tentative seniority list of Senior Assistants was circulated by respondent No.2 as it stood on 31st January, 2001. In the tentative seniority list respondent No.3 was shown above the petitioner. He made a representation dated 30th April, 2001 against the tentative seniority list. The same was rejected by respondent No.2 on 27th January, 2003. The amended tentative seniority list was also circulated of the post of Senior Assistants as on 22nd January, 2003. The petitioner filed objections dated 5th March, 2003 against the amended tentative seniority list. The same were rejected by respondent No.2 on 5th May, 2003. Consequently, the final seniority list was circulated on

8/9th May, 2003. The petitioner filed an appeal on 27th May, 2003 to the Hon'ble the Chief Justice against the communication and rejection of objections vide letter dated 5th May, 2003. The appeal was rejected and the same was conveyed to him vide letter dated 10th January, 2006.

CWP No.388 of 2006.

The facts of this writ petition are same and similar to CWP No.387 of 2006 except that in the present case the petitioner was appointed to the post of Civil Nazir initially on ad-hoc basis in the pay scale of Rs.1800-3200 consequent upon his selection on the basis of test-cum-interview held on 12th July, 1997. He qualified the typing test pursuant to which his appointment was regularized with effect from 1st December, 1997. He is also aggrieved by the appointment and regularization of respondents No.3 to 7 and had made representations to the higher authorities which stood rejected.

Mr. Bimal Gupta appearing on behalf of the petitioners has strenuously argued that respondents No.3 to 7 could not be regularized retrospectively i.e. from the year 1995, more particularly when his clients had been appointed to the post of Record Keeper and Civil Nazir (Senior Assistants) in accordance with law. He then contended that respondents No.3 to 7 have not been promoted in accordance with law, i.e. Chapter 18-A of the High Court Rules and Orders. His further contention is that the representations made by the petitioners had been rejected without taking into consideration the grounds taken therein.

Mr. Atul Jhingan has supported the various orders passed by respondent No.2 as well as the appellate order.

I have heard the parties and perused the record.

In view to appreciate the rival contentions raised by the learned Advocates it will be congenial to reproduce Rule VI of the High Court Rules and Orders dealing with the promotion of ministerial posts. Rule VI reads thus:-

"VI. Promotion.- (1) Appointments to the higher grades of the ministerial establishment should ordinarily be made by seniority from lower grades, provided that the official who would thus receive promotion possesses the prescribed educational qualifications and is otherwise fit to perform the duties to which he will be promoted for which purpose tests may be imposed. This rule does not apply to such posts as that of stenographers for which special qualifications are needed; but preference should be given to officers with such qualifications who are already working in the lower grades:

Provided that permanent vacancies in the 75-5-125 grade shall be filled by the District and Sessions Judges in the following rotation:-

(i) By selection on merit out of graduates who 'have at least two years' experience in the work of the office, if there is no suitable graduate who fulfills this condition an 'outsider' graduate may be appointed, but he must be one who normally resides within the jurisdiction of the District and Sessions Judge.

(ii) & (iii) By normal promotion in the office, i.e., the appointment of the next senior man whether graduate or non-graduate subject to his fitness:

Provided further that the rotation may be modified in very exceptional cases when the direct appointment of a graduate would mean the ousting of a man, who had been officiating quasi-permanently in the post concerned for an appreciable period. What is an appreciable period will depend on the circumstances of each case. After such a modification, the rotation should be restored as soon as possible.

(2) In making promotions, preference may invariably be shown to officials who are known to be strictly honest. No promotion should be given and no recommendation for promotion made in the case of an official who does not possess and maintain a reputation for strict integrity. Efficiency without honesty is not to be regarded as constituting a claim to promotion."

The High Court had framed the Himachal Pradesh Subordinate Courts' Staff (Recruitment, Promotion and Conditions of Service) Rules, 1997. Rule 5 deals with the eligibility criteria and the method of recruitment is

provided under Rule 7. Rule 12 deals with the appointments which can be made on ad-hoc basis. Rule 14 being relevant is reproduced in its entirety as follows:-

> "Seniority.- (1) Persons appointed in a substantive or officiating capacity in a cadre in the civil and Sessions Division on the date immediately preceding the date on which these rules came into force, shall retain the relative seniority already assigned to them.
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> (2) Subject to provision of sub-rules (1) and (3) of this rule, permanent members in each cadre shall rank senior to persons who are officiating in that cadre.
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> (3) The seniority of the direct recruits shall be determined by the order of merit in which they are selected for appointment and persons appointed as a result of an earlier selection shall be senior to those appointed as a result of subsequent selection.
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> (4) The relative seniority-cum-merit to the various posts shall be determined on the basis of their length of service in the feeder cadre.
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> (5) Where the promotions are made on the basis of selection on merit only, the seniority of such promotees shall be in the order of merit determined by the Appointing Authority."

The post of Record Keeper (Senior Assistant) was advertised and consequently the petitioner Chure Ram Thakur applied for the same. The petitioner being fully eligible and qualified was offered the appointment to the post of Record Keeper (Senior Assistant) on 28th February, 1996. As far as respondents No.3 to 7 are concerned, they were promoted on ad-hoc basis vide office order dated 22nd August, 1995.

Shri Sukh Ram was initially promoted as Civil Nazir (Senior Assistant) with effect from 14th July, 1997 on the basis of the recommendation of the Selection Committee after his suitability was adjudged. He was regularized with effect from 1st December, 1997 vide office order dated 21st November, 1997. It is evident from the combined reading of

office order dated 14th July, 1997 and office order dated 21st November, 1997 that the appointment of Shri Sukh Ram was in accordance with law unlike respondents No.3 to 7.

Now the Court has to consider whether the promotion of respondents No.3 to 7 was in conformity with the Recruitment and Promotion Rules as extracted above. Rule VI of the High Court Rules and Orders specifically lays down that as far as the appointment to the higher grades of the ministerial establishment is concerned, the same should ordinarily be made by seniority from lower grades provided that the official who would thus receive promotion possesses the prescribed educational qualifications and is otherwise fit to perform the duties to which he will be promoted, for which purpose tests may be imposed. As far as the permanent vacancies in the 75-5-125 grade are concerned, the same were to be filled up by the District and Sessions Judges by rotation either by selection on merit out of graduates who have at least two years experience in the work of the office and if there was no suitable graduate who fulfills this condition an outsider graduate could be appointed, or by normal promotion in the office i.e., the appointment of the next senior man whether graduate or non-graduate subject to his fitness. It is thus evident that for filling up the post by promotion the test was to be held and the selection was to be made on merit as far as the filling up permanent vacancy in the grade of 75-5-125 was concerned and as far as the normal promotion was concerned the same was to be by appointing a senior man whether graduate or non-graduate subject to his fitness. Though, a specific averment has been made in the petition to the effect that respondents No.3 to 7 have not been promoted as per Rule VI (supra), but there is no denial in the reply filed by the respondents. It is, thus, clear that respondents No.3 to 7 have not passed through the rigours of Rule VI while being promoted even though on ad-hoc basis on 22nd August, 1995. If respondents No.3 to 7 have not been promoted strictly in accordance with the Rules as applicable to

them in the year 1995, they could not be regularized retrospectively vide letter dated 30th April, 1997. The act of respondent No.2 in regularizing respondents No.3 to 7 has seriously prejudiced the petitioners. The petitioner Chure Ram Thakur had been appointed as Record Keeper and petitioner Sukh Ram had been appointed as Civil Nazir equivalent to Senior Assistant on the basis of merit after qualifying the test. They have been discriminated against vis-a-vis respondents No.3 to 7. They had made representations at the time when respondent No.3 was being regularized but the said representations had been rejected by the respondent No.2. The representations made by them against the seniority list whereby respondents No.3 to 7 were ranking senior to them had also been rejected. The gist of the representations made by the petitioners against respondents No.3 to 7 was that they could not be regularized retrospectively and more particularly when their initial appointment was itself contrary to the Recruitment and Promotion Rules. The petitioners had also pointed out in their representations that the seniority of the petitioners vis-a-vis respondents No.3 to 7 was to be regulated under Rule 14 of the HP Subordinate Courts' Staff (Recruitment, Promotion and Conditions of service) Rules, 1997. This aspect has not been considered by respondent No.2 while rejecting the representations of the petitioners. The petitioners had been appointed in conformity with the Recruitment and Promotion Rules as applicable at the relevant time i.e. 1995 and 1997.

The Hon'ble Supreme Court has held in the following cases that the period of ad-hoc services can not be counted for regular service if, the initial appointment is not inconformity with law:-

Their Lordships of the Supreme Court in **Sanjay K. Sinha-II and others** v. **State of Bihar and Others,** (2004) 10 SCC 734, have held that the appointment made contrary to the rules is merely fortuitous and do

not confer benefit of seniority on the appointees over and above the regular/substantive appointees to the service.

In **K. Madalaimithu and another** v. **State of Tamil Nadu and others**, (2006) 6 SCC 558, their Lordships have held that seniority of a person appointed temporarily to a particular post without recourse to the recruitment rules can be counted only from the date on which his services are regularized. Para 24 of the judgment is relevant, which reads thus:-

> "24. On a consideration on the submissions made on behalf of the respective parties and the decisions cited on their behalf, the consistent view appears to be the one canvassed on behalf of the appellants. The decisions cited by Mr. Rao have been rendered in the context of Rule 10(a)(i)(1) and the other relevant rules which are also applicable to the facts of the instant case. Apart from the above, the law is well settled that initial appointment to a post without recourse to the rules of recruitment is not an appointment to a service as contemplated under Rule 2(1) of the General Rule, notwithstanding the fact that such appointee is called upon to perform duties of a post borne on the cadre of such service. In fact, Rule 39(c) of the General Rules indicates that a person temporarily promoted in terms of Rule 39(a) is required to be replaced as soon as possible by a member of the service who is entitled to the promotion under the Rules. It stands to reason that a person who is appointed temporarily to discharge the functions in a particular post without recourse to the recruitment rules, cannot be said to be in service till such time as his appointment is regularized. It, therefore, follows that it is only from the date on which his services are regularized that such appointee can count his seniority in the cadre."

In **Regional Institute of Medical Science and another** v. **S. Bhagyabati Devi,** 2008(8) Scale 99, their Lordships have upheld the order passed by the Division Bench of Imphal Bench of Gauhati High Court whereby Dr. Bhagyabati was declared senior to Dr. Taruni without effecting her appointment which was contrary to law.

In the present case, it is evident from the observations made hereinabove that the respondents have failed to place on record any material suggesting that the appointment/promotion of respondents No.3 to 7 was in accordance with the Recruitment and Promotion Rules i.e. Chapter 18-A of the High Court Rules and Orders. The respondents have also failed to place any contemporaneous record before the Court that the regularization of respondents No.3 to 7 was in accordance with law. Respondents No.3 to 7 could not be regularized retrospectively with effect from 1995 blurtly. If the initial promotion of respondents No.3 to 7 is bad in law and their regularization from anterior date is also held bad in law, in that eventuality they could not be ranked senior to both the petitioners. Both the petitioners were eligible as per the norms laid down and their names had been recommended for promotion to the posts of Senior Assistant/Civil Nazir after adjudging their suitability by the Selection Committee. Petitioner Chure Ram Thakur has been appointed as Record Keeper equivalent to Senior Assistant. Petitioner Sukh Ram has been appointed to the post of Civil Nazir equivalent to Senior Assistant vide order dated 14th July, 1997 and he stood regularized from 1st December, 1997.

Mr. Atul Jhingan had strenuously argued that the petitioners were required to challenge the order of 30th April, 1997 whereby respondents No.4 to 7 were regularized. This plea is untenable and cannot be accepted by the Court for the simple reason that the petitioners are only aggrieved by the benefit given to respondents No.3 to 7 by regularizing them from the back date i.e. 1995 which in fact is arbitrary. The petitioners had challenged the seniority list including the tentative seniority list as and when the same was circulated and had filed detailed representations against them.

In view of the observations made hereinabove the writ petitions are allowed. The impugned seniority list (Annexure P-15) and rejection order (Annexure P-18) dated 10th January, 2006 are hereby

quashed. Respondent No.2 is directed to redo the seniority list and show the petitioners senior to respondents No.3 to 7 without disturbing their appointments. The petitioners are also entitled for costs of the petitions which are quantified at Rs.5,000/-.

December 5th, 2007 **(Rajiv Sharma), J.**
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